



**ASSISTANT SECRETARY OF DEFENSE**  
WASHINGTON, D. C. 20301

**HEALTH AFFAIRS**

**NOV 21 1983**

BEFORE THE OFFICE, ASSISTANT  
SECRETARY OF DEFENSE (HEALTH AFFAIRS)  
UNITED STATES DEPARTMENT OF DEFENSE

Appeal

of

OASD (HA) File 83-30  
FINAL DECISION

Sponsor:

**SSN**

This is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) in the CHAMPUS Appeal OASD(HA) Case File 83-30 pursuant to 10 U.S.C. 1071-1089 and DoD Regulation 6010.8-R, chapter X. The appealing party is the CHAMPUS beneficiary. The appeal was undertaken by the beneficiary's husband, a retired enlisted member of the United States Air Force, who was appointed his wife's legal guardian by the Circuit Court for State of , for the purpose of pursuing any and all insurance coverage for expenses incurred by the beneficiary for her care and treatment. The appeal involves inpatient care received in a skilled nursing facility, the Fairfax Nursing Center, from March 19, 1979, through January 15, 1980. The amount in dispute is the billed charges from the Fairfax Nursing Center and involves approximately \$26,000.00.

The hearing file of record, the tape of oral testimony presented at the hearing, the Hearing Officer's Recommended Decision, and the Analysis and Recommendation of the Director, OCHAMPUS, have been reviewed. It is the Hearing officer's finding that the beneficiary was under custodial care at the Fairfax Nursing Center from May 1, 1979, through January 15, 1980. The Hearing Officer recommended that CHAMPUS coverage be authorized for 1 hour of skilled nursing services per day and for prescription drugs. Finally, the Hearing Officer found that any other CHAMPUS benefits provided by the fiscal intermediary for care at the center during June 1979 be refunded. The question of whether the care received from March 19, 1979, to April 30, 1979, was custodial care was not addressed in the Recommended Decision.

The Director, OCHAMPUS, concurs with the Hearing Officer's Recommended Decision for the May 1, 1979, to January 15, 1980, period of care, but recommends the FINAL DECISION address the entire episode of care from March 19, 1979, to January 15, 1980. The Director, OCHAMPUS, therefore, recommends issuance of a FINAL DECISION by this office denying CHAMPUS cost-sharing for the entire period of care from March 19, 1979, through January 15,

1980, at Fairfax Nursing Center as custodial care with the exceptions of 1 hour of skilled nursing care per day and authorized prescription drugs.

Under Department of Defense Regulation 6010.8-R, chapter X, the Assistant Secretary of Defense (Health Affairs) may adopt or reject the Hearing Officer's Recommended Decision. In the case of rejection, a FINAL DECISION may be issued by the Assistant Secretary of Defense (Health Affairs) based on the appeal record.

The Acting Principal Deputy Assistant Secretary of Defense (Health Affairs) acting as the authorized designee for the Assistant Secretary, after due consideration of the appeal record, concurs with the Director, OCHAMPUS, and adopts the Hearing Officer's Recommended Decision with the modifications recommended by the Director, OCHAMPUS.

The FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) is, therefore, to deny CHAMPUS coverage for care provided to the beneficiary while confined at Fairfax Nursing Center from March 19, 1979, through January 15, 1980, as custodial care. However, up to 1 hour of skilled nursing care per day and prescription drugs shall be cost-shared under the CHAMPUS regulation provision regarding benefits available in connection with a custodial care case.

#### FACTUAL BACKGROUND

The beneficiary in this appeal is the wife of a retired enlisted member of the United States Air Force. On October 12, 1978, the sponsor noticed something wrong with his wife, administered cardiopulmonary resuscitation (CPR), and called the rescue squad. The beneficiary sustained a cerebral insult due to the rupture of a left pericallosal artery aneurysm and was initially treated at

Hospital in . On October 14, 1978, she was transferred to Andrews Air Force Base and then transferred to Walter Reed Army Medical Center until March 19, 1979, when she was transferred to the Fairfax Nursing Center.

The beneficiary received care at the Fairfax Nursing Center from March 19, 1979, to January 15, 1980, when she returned to Walter Reed Army Medical Center. She remained at Walter Reed Army Medical Center until October 4, 1980, at which time she was transferred to the Kensington Nursing Home. At the hearing, the sponsor stated that the beneficiary was still at Kensington. It is the period of care at the Fairfax Nursing Center that is at issue in this appeal.

The hospital discharge summary from Walter Feed Army Medical Center states, in part:

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"The patient. was admitted to the Neurosurgery Service, Walter Reed Army Medical Center following lumbar puncture which was grossly bloody. She was vigorously treated using the subarachnoid hemorrhage protocol and arteriography showed a left pericallosal artery aneurysm. Over the ensuing few weeks her mental [sic] status did not improve, however, her right sided weakness improved some. On 7 December 1978 she underwent clip ligation of the aneurysm without complication. Postoperative arteriography showed obliteration of the aneurysm. On 19 December 1978 a tracheostomy was performed in order to insure adequate pulmonary toilet. CT scans performed during the course of the hospitalization showed the onset of hydrocephalus, most marked in both frontal horns. This was presumed due as a consequence to the subarachnoid hemorrhage. A ventriculoperitoneal shunt was placed without complications on 22 February 1979 in order to relieve the hydrocephalus. Throughout her hospitalization she has maintained fairly stable vital signs. Her mental status has never improved over that of the admission status, and at the present time she has only spoken a few words and does not appear to understand verbal communication. Her clinical condition is that of an akinetic mute.

. . . .

"Her mental status has remained essentially unchanged for 5 months and minimal improvement is expected. She will require nursing care for all bodily functions."

On March 19, 1979, the beneficiary was admitted to the Fairfax Nursing Center's Skilled Care Unit. The CHAMPUS Fiscal Intermediary for the State of \_\_\_\_\_ cost-shared the claims for care at Fairfax Nursing Center from March 19, 1979, to April 30, 1979, in the amount of \$2,777.60, and from June 1, 1979, to June 30, 1979, in the amount of \$1,529.69. CHAMPUS claims were denied for care received from May 1, 1979, to May 31, 1979, and from July 1, 1979, to January 15, 1980. The total billed charges for the entire period of care are approximately \$26,000.00. Although the charges include prescription drugs and some therapy, the majority of charges involve the facility's \$75.00 per day room charge.

The physical examination recorded by \_\_\_\_\_, M.D., the staff physician, upon the beneficiary's admission to the nursing center states, "the pt. has need of nursing care for all aspects

of daily needs." She "Does not move any part of her body."  
 Rehabilitation potential is stated by Dr. \_\_\_\_\_ to be "nil."  
 This prognosis is repeated in Dr. \_\_\_\_\_ progress notes for  
 June 28, 1979.

Before issuing its First Level Appeal Determination, OCHAMPUS requested a medical review from the Colorado Foundation for Medical Care. The medical review was done by two medical doctors, one a specialist in neurology and the other a specialist in internal medicine. The reviewers opined:

"The medical documentation presented on this patient demonstrates generally that there was little possibility of improvement in the patient's condition during the confinement in the skilled nursing facility. The patient's disability was most likely to be permanent without significant neurological recovery, and indeed the records did not indicate neurological improvements during the stay. The care provided during the stay appears to be primarily custodial in nature and did not appear to require skilled nursing services."

In a January 7, 1980, letter to the fiscal intermediary, the Fairfax Nursing Center administrator submitted a summary description by, \_\_\_\_\_ R.N., Director of Nurses, of the care received by the beneficiary and a statement from Dr. \_\_\_\_\_

The nursing summary included a statement that:

"The first few attempts at oral feeding were successful. After a few days, though, the patient was unable to swallow at all. She seemed to understand instructions but lack of motivation to develop whatever potential was present . . . tube feedings are and have been the only means of nutrition for this patient."

The summary noted that the beneficiary was observed in a grand mal seizure on June 7, 1979, and treated with "valium stat."

Dr. \_\_\_\_\_ note dated December 6, 1979, stated the beneficiary "requires total skilled care in essentials of daily living" and that "she will continue to require this skilled care for an undeterminate [sic] period of time."

By letter dated May 13, 1980, OCHAMPUS issued its First Level Appeal Determination and advised the sponsor that:

". . . o it has been determined benefits cannot be approved for (the beneficiary's] inpatient care at the Fairfax Nursing Center beginning May 1, 1979, to January 15, 1980. The basis

for this decision is that the care provided is custodial in nature and, as such, not a covered benefit under the CHAMPUS Basic Program."

No request for a hearing was made until Mr. \_\_\_\_\_ an attorney for the sponsor, by letter dated March 3, 1981, acknowledged that the 60-day period for requesting a hearing had lapsed but requested that it be waived. OCHAMPUS in reviewing the file noted that the beneficiary may have been mentally incompetent during the period in which an appeal should have been filed, and that, apparently, no one was legally authorized to act for her during the appeal period. OCHAMPUS found there were extraordinary circumstances over which the beneficiary had no practical control which met the regulatory requirements for waiving the 60-day appeal period. By letter dated October 8, 1982, \_\_\_\_\_ submitted an order dated September 20, 1982, in the Circuit Court for \_\_\_\_\_ County, State of \_\_\_\_\_. that appointed the sponsor guardian over the person of the beneficiary for the purpose of pursuing any and all insurance coverage for expenses incurred by the beneficiary for her care and treatment.

The hearing was held in \_\_\_\_\_ on March 14, 1983, before OCHAMPUS Hearing Officer, Mr. \_\_\_\_\_. The beneficiary was represented by the sponsor, as her guardian, and by attorney \_\_\_\_\_. The Hearing officer has issued his Recommended Decision and issuance of a FINAL DECISION is proper.

## ISSUES AND FINDINGS OF FACT

### Custodial Care

Under 10 U.S.C. 1077(b)(1), custodial care is specifically excluded by Congress from CHAMPUS cost-sharing. DoD 6010.8-R, chapter IV, E.12 implements this exclusion by providing, in relevant part, as follows:

"12. Custodial Care. The statute under which CHAMPUS operates specifically excludes custodial care. This is a very difficult area to administer. Further, many beneficiaries (and sponsors) misunderstand what is meant by custodial care, assuming that because custodial care is not covered, it implies that custodial care is not necessary. This is not the case; it only means the care being provided is not a type of care for which CHAMPUS benefits can be extended.

"a. Definition of Custodial Care. Custodial Care is defined to mean that care rendered to a patient (1) who is mentally or physically disabled and such disability is expected to

continue and be prolonged, and (2) who requires a protected, monitored and/or controlled environment whether in an institution or in the home, and (3) who requires assistance to support the essentials of daily living, and (4) who is not under active and specific medical, surgical and/or psychiatric treatment which will reduce the disability to the extent necessary to enable the patient to function outside the protected, monitored, and/or controlled environment. A custodial care determination is not precluded by the fact that a patient is under the care of a supervising and/or attending physician and that services are being ordered and prescribed to support and generally maintain the patient's condition, and/or provide for the patient's comfort, and/or assure the manageability of the patient. Further, a custodial care determination is not precluded because the ordered and prescribed services and supplies are being provided by a R.N., L.P.N., or L.V.N.

"b. Kinds of Conditions that Can Result in Custodial Care. There is no absolute rule that can be applied. With most conditions there is period of active treatment before custodial care, some much more prolonged than others. Examples of potential custodial care cases might be a spinal cord injury resulting in extensive paralysis, a severe cerebral vascular accident, multiple sclerosis in its latter stages or pre-senile and senile dementia. These conditions do not necessarily result in custodial care but are indicative of the types of conditions that sometimes do. It is not the condition itself that is controlling but whether the care being rendered falls within the definition of custodial care.

"c. Benefits Available in Connection With a Custodial Care Case. CHAMPUS benefits are not available for services and/or supplies related to a custodial care case (including supervisory physician's care), with the following specific exceptions:

(1) Prescriptive Drugs. Benefits are payable for otherwise covered prescriptive drugs even if prescribed primarily for the purpose of making a person receiving custodial care manageable in the custodial environment.

- (2) Nursing Services: Limited. It is recognized that even though the care being received is determined to be primarily custodial, an occasional specific skilled nursing service may be required. Where it is determined such skilled nursing services are needed, benefits may be extended for one (1) hour of nursing care per day.

- (3) Payment for Prescriptive Drugs and Limited Skilled Nursing Services Does Not Affect Custodial Care Determination. The fact that CHAMPUS extends benefits for prescriptive drugs and limited skilled nursing services in no way affects the custodial care determination if the case otherwise falls within the definition of custodial care.

"d. Beneficiary Receiving Custodial Care: Admission to a Hospital. CHAMPUS benefits may be extended for otherwise covered services and/or service supplies directly related to a medically necessary admission to an acute care general or specific hospital, under the following circumstances:

- (1) Presence of Another Condition. When a beneficiary receiving custodial care requires hospitalization for the treatment of a condition other than a condition for which he or she is receiving custodial care (an example might be a broken leg as a result of a fall); or

- (2) Acute Exacerbation of the Condition for Which Custodial Care is Being Received. When there is an acute exacerbation of the condition for which custodial care is being received which requires active inpatient treatment which is otherwise covered.

"

The record in this appeal must be reviewed under the four criteria in the CHAMPUS definition of custodial care.

- o Mentally or physically disabled and such disability is expected to continue and be prolonged.

The evidence in this appeal clearly establishes the beneficiary was disabled and that such disability was expected to continue and be prolonged. On October 12, 1978, the patient sustained a cerebral insult due to the rupture of a left pericallosal artery aneurysm and was eventually hospitalized at Walter Feed Army

Medical Center. The patient's hospital discharge summary indicated that her mental status had remained essentially unchanged during her 5 month hospital admission, that minimal improvement was expected, that she had spoken only a few words, and that she did not appear to understand verbal communication. None of the reports of the treating physicians indicate an expectation that the beneficiary's disability was to be short-term or improved in the near future. In fact, Dr. stated in his notes that the potential for the beneficiary's recovery or rehabilitation was nil.

The Director of Nurses, Fairfax Nursing Center, summarized the beneficiary's physical condition as follows:

"The only form of communication has been the patient's facial expressions and subtle body tensions. Speech therapy has proven unproductive, generally . . . . From admission the patient has been immobile except for an occasional but limited nod of her head.

In addition, the beneficiary's husband testified at the hearing that he had not observed any improvement in his wife's condition during her stay at the Fairfax Nursing Center.

Finally, the two medical reviewers from the Colorado Foundation for Medical Care opined that:

"This patient's physical condition is such that neurological disability is expected to continue and be prolonged, and the patient is not expected to get better."

The Hearing Officer concluded that the evidence showed that the beneficiary was both mentally and physically disabled and that such disability was expected to continue for a long time. In view of the above, I agree with the Hearing Officer and adopt his conclusion.

- o Requires a protected, monitored and controlled environment whether in an institution or in the home.

The Hearing Officer determined that the attending physicians' evaluations of the beneficiary's condition, the progress notes concerning her stay at the nursing center, the report of the Center's Director of Nurses, and the husband's testimony at the hearing all established that the beneficiary required a protected, monitored, and controlled environment. The evidence of record supports this determination.

During her entire stay at the nursing center, the beneficiary was fed by nasogastric tube, used a Foley catheter, and received continual care for all bodily functions. From the date of

admission, the beneficiary was immobile except for an occasional, limited nod of the head. Initially she was transferred from her bed to a geriatric chair daily until her tolerance gradually increased to 2 1/2 hours daily; however, on May 8, 1979, she became pale and profusely diaphoretic. Her tolerance gradually decreased and subsequent attempts to transfer her from bed produced tension and rigidity severe enough to endanger her safety during transfer.

Based on the hearing record I agree with the Hearing Officer's determination that the beneficiary required a protected, monitored, and controlled environment.

- o Requires assistance to support the essentials of daily living.

Upon discharge to the Fairfax Nursing Center, the hospital discharge summary indicated that the patient required nursing care for all bodily functions, and the nursing center's admission record indicates the patient was in need of nursing care for all aspects of daily needs. The progress notes concerning the beneficiary's stay at the nursing center, the report of the nursing center's Director of Nursing, and the husband's testimony at the hearing all established that the beneficiary required assistance to support the essentials of daily living. Nasogastric tube feeding was the only source of nutrition for the beneficiary; a Foley Catheter was used for excretory functions and was checked and maintained daily by the nursing staff; the beneficiary was repositioned daily by the nursing staff and her husband to alleviate or prevent the development or aggravation of bed sores. Finally, the medical Reviewers opined:

"In view of the patient's almost total immobility, there is a definite requirement for assistance to support the essentials of daily living."

Based on the evidence of record, I find that the beneficiary required assistance to support the essentials of daily living during the entire episode of care in the Fairfax Nursing Center.

- o Not under active or specific medical, surgical, and/or psychiatric treatment to the extent necessary to enable the patient to function outside the protected, monitored, and/or controlled environment.

A Determination regarding this criterion requires analysis of the care rendered to the beneficiary and medical opinions regarding her prognosis. Although the beneficiary received treatment for various problems including vaginal discharge, respiratory infection, seizures, and decubitus, there is no evidence of a treatment plan designed to reduce her disability to enable the beneficiary to function outside a protected, monitored, or controlled environment.

Speech therapy was discontinued due to her lack of response, and physical therapy did not improve her mobility. However, the speech therapy and range of motion exercises, while intended to improve the beneficiary's condition, were neither designed nor expected to improve the beneficiary's condition sufficiently to enable the patient to function outside the controlled environment.

The treating physician stated in his progress notes that the beneficiary's rehabilitation potential was nil and noted as late as December 6, 1979, that the patient would require continued care in the facility for an indefinite period of time. Finally, the medical reviewers opined:

"This patient did not appear to be under active medical treatment which would reduce the disability to the extent necessary to enable the patient to function outside a protected and monitored environment. Speech therapy was shown to be unproductive, apparently only passive range of motion was possible, and the balance of care provided was not going to reduce the primary disability any further and was essentially custodial in nature."

In view of the above, I find the beneficiary was not under active and specific medical care which would reduce the beneficiary's disability to the extent necessary to enable the beneficiary to function outside a protected environment.

The Hearing Officer, having determined that the evidence of record showed that the beneficiary met all criteria specified in the CHAMPUS definition of custodial care, found that the care received in the Fairfax Nursing Center from May 1, 1979, through January 15, 1980, was custodial care. I concur with this finding and adopt it as the finding of the Acting Assistant Secretary of Defense (Health Affairs).

However, I reject the Hearing Officer's Recommended Decision to the extent it fails to address the care received at the Fairfax Nursing Center from March 19, 1979, through April 30, 1979. There is no indication in the file that the care received by the beneficiary from the date of admission (March 19, 1979) through April 30, 1979, was in any essential way different from the care received after May 1, 1979. The nursing notes, progress notes, and admission screening all show the beneficiary as being in the same condition and receiving the same type of care from March 19, 1979, through April 30, 1979, as in subsequent months.

Custodial care is prohibited by statute from being a CHAMPUS benefit. In deciding an appeal, it is necessary to address the entire episode of care to ensure compliance with statutory authority. Whether the care rendered from March 19, 1979, to April 30, 1979, could be cost-shared was not addressed by the Hearing officer in his decision; nevertheless, it is part of this



appeal since it was part of the same episode of care. The medical records in the record cover this period.

Analysis of the entire record in this appeal, including records for the period March 19, 1979, through April 30, 1979, establishes the beneficiary's, entire episode of care at the nursing center met the four criteria of custodial care as defined in DOD 6010.8-R. Therefore, I find that the entire period of care at the Fairfax Nursing Center (March 19, 1979, through January 15, 1980) was custodial care and is excluded from CHAMPUS coverage. As set forth in the previously cited custodial Care provisions of the CHAMPUS regulation (DoD 6010.8-P, chapter IV, E.12.c.) , CHAMPUS benefits are not available for services and supplies related to a Custodial care case (including supervising physician's care), with two specific exceptions. That is, benefits are payable for otherwise covered prescription drugs and benefits are payable for up to 1 hour of nursing care per day.

Based on this Regulation provision, the Hearing Officer recommended CHAMPUS cost-sharing of prescription drugs of the beneficiary not withstanding the finding of custodial care. I concur and authorize the CHAMPUS cost-sharing of all otherwise authorized prescription drugs of the beneficiary from March 19, 1979, through January 15, 1980. Whether 1 hour per day nursing can be cost-shared in this case depends on determination that the nursing care met the CHAMPUS criteria for skilled nursing care.

#### Skilled Nursing Care

Skilled nursing care is defined in DoD 6)10.8-F., chapter II, B.163 as:

" . . . a service which can only be furnished by an R.N. (or L.P.N. or L.V.N.), and required to be performed under the supervision of a physician in order to assure the safety of the patient and achieve a medically desired result. Examples of skilled nursing services are intravenous or intramuscular injections, levin tube or gastrostomy feeding, or tracheotomy aspiration and insertion. Skilled nursing services are other than those services which primarily provide support for the essentials of daily living or which could be performed by an untrained adult with minimal instruction and/or supervision.

The record reflects that the beneficiary was fed by nasogastric tube feedings 4 times a day, with daily feedings requiring approximately 1 hour per day. The beneficiary was also administered prescription drugs on a daily basis by a registered nurse usually through the nasogastric tube, and was treated

With "valium stat" as a result of a grand mal seizure suffered on June 7, 1979.

I find the above described services meet the definitions of skilled nursing care and are authorized coverage as benefits available in connection with a custodial care case. Therefore, it is the decision of the Assistant Secretary of Defense (Health Affairs) that 1 hour of skilled nursing care per day may be cost-shared by CHAMPUS for care received by the appealing party from March 19, 1979, through January 15, 1980.

SUMMARY

In summary, it is the FINAL DECISION of the Assistant Secretary of Defense (Health Affairs) that, except for 1 hour of skilled nursing care per day and authorized prescription drugs, care at Fairfax Nursing Center from March 19, 1979, through January 15, 1980, care is excluded from CHAMPUS coverage because it was custodial care. This decision does not imply that the services were not necessary; it means only that the care received is not the type of care for which CHAMPUS payments can be extended. While I realize the overwhelming problems associated with the case of an incapacitated individual, I am bound to adjudicate CHAMPUS claims in accordance with statutory limitations and regulatory confines. The matter of appropriate payment for the care which can be cost-shared and recoupment under the Federal Claims Collection Act of any erroneous payments is referred to the Director, OCHAMPUS, for appropriate action. Issuance of this FINAL DECISION completes the administrative process under DoD 601C.8-P, chapter X, and no further administrative appeal is available.



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Acting Principal Deputy Assistant Secretary